



SECRETARY OF STATE
STATE OF INDIANA

October 22, 2010

TODD ROKITA
SECRETARY OF STATE

Ms. Sonia J. Leerkamp, Hamilton County Prosecuting Attorney
1 Hamilton County Square, Room 134
Noblesville, IN 46060

Mr. John E. Dowd, Special Prosecutor
610 North Senate Avenue
Indianapolis, IN 46202

Mr. Daniel J. Sigler, Special Prosecutor
Bloom, Gates, Sigler & Whiteleather, LLP
119 South Main Street
Columbia City, IN 46725-0807

Re: Vote Fraud Allegations in Hamilton County May, 2010 Primary Election

Dear Prosecutor Leerkamp, Prosecutor Dowd and Prosecutor Sigler:

At the request of the Chairman of the Indiana Democratic Party, the Secretary of State, Indiana's Chief Election Officer has reviewed the circumstances of Charles P. White's voting in the above referenced election. The Secretary of State believes that appropriately investigating and responding to allegations of vote fraud is a matter of the highest public interest, and as such has undertaken a review of available documents and conducted a legal analysis of the claims made.

To assist in your review, the Office is herewith providing a report prepared by the General Counsel, a copy of West's Indiana Election Code, copies of state election training and administration guides and a copy of the 2010 election calendar. In deference to your prosecutorial authority, the Office has refrained from making specific findings of fact, legal conclusions or dispositional recommendations. However, the collection of evidence and analysis of the facts and law should assist you with your own review and analysis. Please feel free to contact the Office of the Secretary of State if you have questions about the report or if the Office can be of assistance to you in any way.

Sincerely,

Chris Naylor, Deputy Secretary of State
Office of the Indiana Secretary of State

**Agency Review of Alleged Vote Fraud in Hamilton County 2010 Primary Election
Table of Contents**

	Page
1. Summary	3
2. Introduction	4
3. Summary of Relevant Facts	6
4. The Case for Vote Fraud	9
a) Registration	10
b) Residence	10
c) Knowledge	12
d) Exceptions	13
5. The Case for Voter Registration Fraud	16
a) Submission	16
b) Knowledge	19
c) Materially False or Fraudulent	20
6. Lesser Offenses	21
a) Lesser Included Offenses Generally	21
b) Withholding Information	23
7. Conclusion	24
8. Appendix	
1. Documents	1A – 1V
2. Indiana Code Statutes	2A – 2R
3. Cases	3A – 3K

Agency Review of Alleged Vote Fraud in Hamilton County 2010 Primary Election

1. Summary

The Agency has conducted an investigation and analysis of a single allegation of vote fraud in the Hamilton County 2010 Primary Election.¹ The basic allegation is that Charles P. White (White) maintained a registration in a precinct in which he was not a resident and voted in a precinct in which he did not live. Subject to prosecuting authorities proving all of the required elements beyond a reasonable doubt, either or both of these actions constitute violations of the Indiana Election Code and are chargeable as Class D felonies.² In the alternative, White may have knowingly provided incorrect information about the status of his address to a poll taker, which is chargeable as a Class A misdemeanor.³ Based solely on White's voting records, other public documents, and an analysis of statutory and case law, the Agency observes apparent, albeit rebuttable, intent that White knowingly voted in a precinct in which he did not reside in the 2010 Primary Election and/or provided incorrect information to a poll taker.⁴ It is important to note, however, that under the laws of Indiana, White is entitled to a presumption that his voter registrations and voting was lawful. Moreover, in order to establish a case of vote fraud in Indiana, as a matter of law, all relevant evidence and circumstances must be taken into account, including the knowledge and intent of the voter. At this point, given the evidence is limited and key questions remain unanswered, it is not possible to conclude whether or not White violated any laws.⁵ In view of the seriousness of the allegations and obvious political subtext, White's rights to procedural due process, including a full opportunity to rebut the allegations and hold the state to its high burden of proof, must be respected.

¹ Principle investigator: Jerold A. Bonnet, General Counsel, Office of the Indiana Secretary of State.

² See: IC 3-14-3-1.1 False, fictitious, or fraudulent registration applications or ballots; and IC 3-14-2-11 Voting in other precincts.

³ See: IC 3-14-2-7 Withholding information or furnishing false information to poll taker...

⁴ Note that there may be some legal ambiguity in the Election Code regarding the precise definition of a "poll taker" (see IC 3-6-6-11 *et seq.*) versus a "poll clerk" (see for example IC 3-10-12-3.4 (e)).

⁵ Certainly the testimony of witnesses and, if offered, from the subject himself would facilitate understanding the inculpatory or exculpatory nature of the acts.

2. Introduction

On September 28th and 29th, 2010 the Office of the Indiana Secretary of State received correspondence from the Indiana Democratic Party questioning the eligibility of Secretary of State candidate Charles P. White (White) to vote in Hamilton County precinct Delaware 12 in the 2010 Primary Election.⁶ The Democratic Party alleges that White voted in a precinct in which he did not reside in violation of IC 3-14-2-11.⁷ The Democratic Party also alleges that White was not registered to vote in the district for which he was nominated as a candidate for office as of the deadline for filing a Certificate of Nomination (CAN-23) pursuant to IC 3-8-1-1 (b).⁸ The Democratic Party requested that the Secretary of State, the state's Chief Election Officer, undertake a special investigation into these issues. The office also received copies of letters authored by Hamilton County Democratic party official Gregory Purvis and Democrat candidate for Secretary of State Vop Osili, decrying the alleged vote fraud and requesting immediate appointment of a special prosecutor to investigate the claims.

In the interest of promoting the highest possible level of confidence in elections in Indiana, the Office of the Secretary of State endeavors to assist election administrators or law enforcement officials in evaluating credible cases of vote fraud or otherwise.⁹

⁶ See Documents 6 and 7.

⁷ IC 3-14-2-11 Voting in other precincts: Except as provided by IC 3-10-10, IC 3-10-11, or IC 3-10-12, a person who knowingly votes or offers to vote in a precinct except the one in which the person is registered and resides commits a Class D felony.

⁸ **IC 3-8-1-1 Candidates must be registered voters**

(b) A person is not qualified to run for:

- (1) a state office;
- (2) a legislative office;
- (3) a local office; or
- (4) a school board office;

unless the person is registered to vote in the election district the person seeks to represent not later than the deadline for filing the declaration or petition of candidacy or certificate of nomination.

⁹ Though the Secretary of State, bearing the mantle of Indiana's Chief Election Officer, lacks formal, statutory, election law investigation and enforcement authority, during his two terms in office, Secretary Rokita has responded to the public's frustration with elected officials and law enforcement agencies that disregard credible allegations of vote fraud. The Office of the Secretary of State has also continuously provided leadership, experience and subject matter expertise in the area of election law and administration at local, state and federal levels of government. The Election Code provides the Indiana Election Commission and Local Election Boards with authority to subpoena witnesses and documents and conduct public hearings (see: IC 3-6-4.1-19 and 3-6-5-27). The Secretary of State does have statutory authority to investigate voting system (i.e.: voting machine) violations (IC 3-11-17 et. seq.) and investigation authority

Typically the Secretary has limited the role of the Agency to investigating claims, gathering physical evidence and developing legal analyses for further evaluation and use by election boards and law enforcement agencies. In doing this work, the Agency utilizes its experience and personnel in other areas of responsibility where it has criminal investigative authority such as the Securities Division and the Auto Dealership Division.

It is noted that the allegations of vote fraud, which target the Secretary of State candidate of one political party, have been made by state and county officials and the candidate of another political party. The political subtext of the allegations cannot be overlooked, and as with other office investigations the motives of the accusers have been questioned and given due weight. It is also evident that media interest in this issue is largely a function of the role the allegations play as a campaign issue, during an “off-year” statewide office race that has otherwise been relatively uneventful.

In response to the request of the Democratic Party and in recognition of the public’s interest in the matter, the Agency has undertaken a preliminary investigation of the allegations as well as an analysis of the major legal issues presented. The following report is limited to a summary of facts as known to the Agency, identification of key issues and discussion of specific election laws and general legal principles. Unlike other of the office’s election fraud investigations, the prosecutor assuming jurisdiction over the case has agreed to look into the matter, specifically by appointing two experienced special prosecutors. Therefore, the Agency will not offer a final opinion regarding criminal guilt or innocence at this time. However, this report should serve as a guide to those lacking significant election law and election administration experience in understanding the facts, law and public policy issues involved.¹⁰ Furthermore, pursuant

in his capacity as the Chair of the State Recount Commission (IC: 3-12-10-2.1). Recognizing that election boards and prosecutors have on occasion paid little attention to vote fraud complaints, the Secretary of State repeatedly sought broad election law investigation and enforcement authority from the General Assembly. However, these and other proposed election law reforms were consistently opposed and defeated by the Democratic House Majority caucus.

¹⁰ Note: On October 8th 2010, after this report was substantially complete, the Hamilton County Prosecutor’s office contacted this agency to verify published reports that the agency was investigating the allegations and with a request that the prosecutor’s office be supplied with a copy of any completed report. The Agency was notified on October 11th 2010 that the Hamilton County Prosecutor had sought and received judicial approval to appoint two Special Prosecutors, John E. Dowd and Daniel J. Sigler to review the allegations.

to the request received, this report will be forwarded to the special prosecutors appointed by the Hamilton County Prosecutor for their use.

3. Summary of Relevant Facts

Based primarily on an examination of publically available documents¹¹ (see Appendix 1 and Appendix A - S for additional detail) the allegations and issues appear to be framed by the following facts:

1. White was married to Nichole S. White (NSW), in September, 1998. The couple had a child in January, 2001. Their residence throughout the marriage was 7527 Broad Leaf Lane, Fishers, Indiana (Broadleaf). The Broad Leaf Lane residence is located in Delaware Township precinct 12, and White and NSW were both registered to vote in this precinct. According to Statewide Voter Registration System (SVRS) records White voted in 2004 and 2006 Primary and General Elections at the Delaware 12 Precinct.
2. White was appointed (by caucus) to the Fishers Town Council as District 2 Representative in 2001. He was reelected to the council as District 2 representative by the voters in 2003 and 2007.
3. White and NSW divorced in December, 2006. The couple share joint custody of their child, who continues to reside with the mother at the Broad Leaf Lane residence.
4. Around the time of the divorce, White moved to a nearby apartment at 6994 Pintail Drive, Fishers, Indiana (Pintail). The apartment is located in Fishers Town Council District 2 and in Delaware Township precinct 14.
5. According to SVRS records, White changed his voter registration from the Broad Leaf Lane address (Delaware Township 12) to the Pintail Drive address (Delaware Township 14) in January, 2007. White voted in the Delaware 14 precinct in the 2007 and 2008 Primary and General Elections.
6. White conveyed his interest in the Broad Leaf Lane residence to his former wife on January 25th 2007 via quitclaim deed.
7. A Charlie White for Secretary of State campaign committee was formed and filed an initial report with the Indiana Election Division on January 26th 2009.

¹¹ Though for the most part the documents reviewed are not certified or authenticated, they appear to be accurate copies of public records. At this time the agency is not aware that the authenticity of any document(s) from which basic facts are derived have been questioned.

8. In a Special Election conducted in November, 2009, White voted at the Delaware 14 precinct. At the time of voting he indicated on the poll book that his address had changed from the Pintail apartment (back) to 7527 Broad Leaf Lane (the residence of White's former wife and child, and his residence prior to his divorce in 2006). The Broad Leaf Lane residence is located in Delaware 12 precinct.
9. In late November, 2009 the Hamilton County Voter Registration Board mailed an acknowledgment card to White to advise him that his voter registration was being changed from Pintail (Delaware Township precinct 14) (back) to Broad Leaf Lane (Delaware Township precinct 12).
10. SVRS records show that White completed and submitted a voter registration card changing his registration from Pintail (Delaware 14) to Broad Leaf Lane (Delaware 12) on February 22nd 2010.
11. On February 26th 2010, White executed closing and financing documents for a condominium located at 13086 Overview Drive Unit 5-B, Fishers, Indiana. (Overview). Public records indicate that the property is residential, that White is the sole owner and that he filed for a homestead property tax exemption. The documents examined do not indicate if or when White physically established residence at the Overview condominium.
12. The Overview condominium is located outside Fishers Town Council District 2 and in Fishers Fall Creek Township Precinct 5.
13. Voter registration for the May, 2010 Primary ended on April 5th 2010. SVRS records do not show that White updated his voter registration on or before this date. However, it is not clear from the records examined where he was living or that he considered his residence (legal domicile) to be as of this date.
14. White voted in the 2010 Primary Election on May 4th 2010 where he was currently registered to vote, at Delaware Township Precinct 12. The poll book indicates his address is Broad Leaf Lane. The "address unchanged" box on the poll book is check marked, presumably by the voter, according to voting procedures outlined in the Secretary of State's Election Day Handbook, which is the training and procedure authority for Indiana poll workers.
15. White and Michelle C. Quigley (MCQ) were married on May 28th 2010. White assumed step-fatherhood of two additional children. The Marriage license application (filed with the Hamilton County Clerk on May 18th 2010) indicated that White's address is 7527 Broad Leaf Lane, Fishers, Indiana.
16. White was nominated Republican Party candidate for secretary of state. The Republican State Committee filed a certificate of nomination of White, (which included his declaration of candidacy (CAN-23)), with the Indiana Election Division on June 16th 2010. On the CAN-23 White's residency address was listed

as 13086 Overview Drive, Fishers, Indiana. The CAN-23 also indicated 7527 Broad Leaf Lane, Fishers, Indiana as “the Candidate’s mailing address”.

17. On September 21st 2010, Hamilton County attorney Greg Purvis announced that he would conduct a press conference the next day to discuss his investigation into White’s residency and qualification for his Fishers Town Council Seat. White formally vacated his seat on the Fishers Town Council later on September 21st 2010.¹²
18. On September 22nd 2010 White utilized the State on-line Voter Registration Service (SVRS) to update his voter registration in Hamilton County indicating that Overview Drive (Fall Creek 5 precinct) was his current residence address and that Broad Leaf (Delaware 12 precinct) was his previous resident address.
19. White updated his Indiana Driver’s license with the BMV on September 28th 2010. His new Indiana Driver’s license indicates the Overview Drive condominium as his address.

In summary, it appears from certain public records that around the time of his separation and divorce from his first wife, that White took an apartment not far from his marital residence (Broad Leaf Lane) where his first wife and child continued to reside.¹³

Available public records do not indicate specific time periods or dates where White lived or slept during the 6-month period between the time he voted in the November 2009 Special Election, (where he indicated that Broad Leaf Lane was his residence) and the time when he voted in the 2010 May Primary Election, where he allegedly did not announce that he was living at the Overview Drive condominium. However, statutes and case law described below indicate that: a) specifically where White was “living” or sleeping from time to time, is not alone, determinative of where his legal domicile for voting purposes was and; b) Indiana courts have defined “residence” for the purpose of representing a political subdivision district differently than “residence” for voting

¹² The circumstances surrounding White’s ongoing qualification for his Fishers town council public office is a matter of concern and inquiry more for the local government body, the State Department of Local Government Finance and the State Auditor, than for state election officials. Therefore, the issue of White’s town council office is not considered in this report.

¹³ As yet unsubstantiated reports in the form of press campaign statements, press reports and “blogs” indicate that White maintained some degree of connectedness with his formal marital residence (i.e. storage of personal effects, residence of child he shared custody with and attempts at reconciliation with his former wife).

purposes.¹⁴ Thus, for example, White's statement in September, 2010 that he resigned his Fishers town council seat "because he no longer lived in district 2" does not necessarily constitute an admission or acknowledgement that his legal domicile for voting purposes had changed as of May 2nd 2010 when he voted in the Primary Election.

4. The Case for Vote Fraud

Indiana Code 3-14-2-11 provides:

"Voting in other precincts"

Except as provided by IC 3-10-10, IC 3-10-11, or IC 3-10-12, a person who knowingly votes or offers to vote in a precinct except the one in which the person is registered and resides commits a Class D felony.

Under Indiana law, ***it is presumed that a voter is not guilty of an unlawful act.*** "This presumption, like a *prima facie* case stands until overthrown." *Pedigo v. Grimes* (1887) 113 Ind. 148, 13 N.E. 700; *Bates v. Prickett*, 5 Ind. 22; *Adams v. Slate*, 87 Ind. 573; *Cleveland, etc., R.R. Co. v. Newell*, 104 Ind. 264; *Louisville, etc., R.W. Co. v. Thompson*, 107 Ind. 442.

There are four operative elements in the particular vote fraud statute which White is alleged to have violated. As the order of the elements is not a factor, for ease of analysis the issues are discussed in a slightly different order than which they are laid out in the statute. The operative elements (that need to be established to prove criminal vote fraud under IC 3-14-2-11) are:

1. Was White **registered** in the precinct in which he voted?
2. Did White **reside** in the precinct in which he voted?
3. Did White possess the required **knowledge** that he was not registered, and/or not a resident of the precinct in which he voted?

¹⁴ See: *State Election Board v. Evan Bayh*, 512 N.E.2d 1313; 1988 LEXIS 113, 1317 "These purposes **differ** from those advanced by laws requiring a public officer to reside within the political subdivision he serves. **Physical presence** is necessary to retain office once elected..." (emphasis added).

4. Did White avail himself of any of the *exceptions* provided in the statute?

a) Registration

It is clear from the public record that White was registered to vote in the Delaware 12 precinct when he voted in the 2010 May Primary. The record shows that he indicated a change of residence from Delaware 14 precinct to Delaware 12 precinct when he voted in a Special Election in November, 2009. White's entry in the poll book when he voted in the November, 2009 Special Election shows a check in the change of address box and a new address is provided (Broad Leaf Lane in Precinct 12). SVRS records show that on November 20th 2009 the Hamilton County Voter Registration office sent a letter to confirm his change of address. The SVRS also contains a copy of a voter registration application signed by White, dated February 22, 2010 indicating an address change from 6994 Pintail Drive apartment (Delaware 14 precinct) to 7527 Broad Leaf Lane (Delaware 12 precinct). The official precinct poll book printed for the 2010 May Primary for Delaware 12 contained a listing showing Charles Patrick White, 7527 Broad Leaf Lane, as a registered voter of that precinct for that election.

b) Residence

Definitions, guidelines and presumptions regarding the residency of a person in a precinct are described in IC 3-5-5, Sections 7 – 18.¹⁵ For example, the place where a person's immediate family resides is presumed to be the person's residence (IC 3-5-5-11). A person can rebut a residence presumption however, by demonstrating intent to reside in another precinct and conduct taken to implement that intent (IC 3-5-5-6). As Title 3, Chapter 5 is not comprehensive and came into existence only in 1995 after the Supreme Court's detailed analysis of residency and domicile in *State Election Board v. Bayh*,¹⁶ it seems likely that the substantial body of case law in Indiana where courts have expounded upon differing types of residency for different purposes, would be relevant in interpreting and applying these statutes.¹⁷

¹⁵ See Appendix 2A.

¹⁶ *State Election Board v. Evan Bayh*, 521 N.E.2d 1313; 1988 Ind. LEXIS 113.

¹⁷ For example, courts have distinguished residency for voting purposes, residency for elected representatives and residency for qualification as a candidate from one another.

Indiana law provides that, the words residence, resident, reside, resided, inhabitant and domicile are equivalent and synonymous. *Culbertson v. Board of Commissioners of Floyd County* (1876), 52 Ind. 361, 366; *Board of Medical Registration and Examination v. Turner* (1960), 241 Ind. 73, 79; 168 N.E.2d 193, 196; *Maddox v. State* (1869) 32 Ind. 111; *In The Matter of David E. Evrard, Judge of the Perry Circuit Court*, (1975) 263 Ind. 435; 333 N.E.2d 765. Thus, determining specifically where White's legal domicile was on May 4th, 2010 by these standards is essential and requires a broad examination of any and all relevant factors, including an examination of the voter's knowledge and intent. *Gallagher v. Indiana State Election Board* 1992 Ind. LEXIS 201, 598 N.E.2d 510; *Callahan v. Parker* 1991 Ind. App. LEXIS 1872, 580 N.E.2d 1006; *State Election Board v. Bayh* 1988 Ind. LEXIS 113, 521 N.E.2d 1313; *Matter of David E. Evrard* (1975) 263 Ind. 435, 333 N.E.2d 765; *White v. Scott* (1908) 171 Ind. 349, 86 N.E. 409. "The question of residence is "a contextual determination to be made by a court upon a consideration of the individual facts of any case." *Evard*, 263 Ind. At 263 Ind, 435. Additionally, "While one is probably limited to having a single residence for voting purposes at any given time, the fact that he has more than one "residence," or place of abode, in which he has substantial investment, social commitment, and interest, and which is useful for any number of purposes, is only one relevant fact among many others to be considered by a court. *Evrard*, *Supra* at 768; *Brownlee v. Duguid*, (1931) 93 Ind. App. 266, 178 N.E. 174.¹⁸

Thus, the provisions of IC 3-5-5 and Indiana jurisprudence on residence, suggest that presumptions that would be made based only on public documents remain "rebuttable," especially since to the Agency's knowledge, neither White nor any other witnesses have been examined under oath.¹⁹ A judicial determination as to White's residency, taking into account all types of obtainable evidence as of the time he voted on May 4th 2010 would be necessary to establish a violation of IC 3-14-2-11, including any subject or

¹⁸ Note: IC 3-5-5-3, which was originally enacted in 1993 as part of the previous codification of the Bayh case at IC 3-7-1 (repealed in 1995) specifically states that a person does not have residence in more than one precinct.) Though IC 3-5-5-1 indicates that a person can only have one residence (domicile) for voting purposes however.

¹⁹ Obviously as a basic tenant of criminal law, White has the right to remain silent and his wife cannot be compelled to testify against him.

witness oral testimony obtained. The Indiana General Assembly has not provided the Secretary of State with the subpoena power necessary to obtain such evidence.²⁰

c) Knowledge

IC 3-14-2-11 provides a particular scienter/mens rea requirement: “a person who knowingly votes... (in a district where the person does not reside)... commits a Class D felony.” The term “knowingly” is defined in the Indiana Criminal Code: IC 35-41-2-2:

“Culpability” (b) a person engages in conduct knowingly if, when he engages in the conduct, he is aware of a high probability that he is doing so;

* * *

And (d) Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct.

Intent and knowledge may be inferred “from the voluntary commission of the prohibited act as well as from the surrounding circumstances.” *Carty v. State*, 421 N.E.2d 1151, 1981 App. LEXIS 1475 (1981)(emphasis added); *Austin v. State*, 425 N.D.2d 736, 1981, Ind. App. LEXIS 1647 (1981). “A self-serving statement of intent is not sufficient to find that a new residence has been established. *Bayh. Infra.*; *Flaughner v. Rogers* (1948), 226 Ind. 32, at 35-36, 77 N.E.2d at 595-96.

Parties alleging vote fraud argue that White’s actions both before and after he voted in the May 4th 2010 Primary evidence his knowledge and intention to violate IC 3-14-2-11 by failing to update his voter registration to reflect that he had moved to the Overview condominium and proceeding to vote in a precinct where he was no longer living – without updating his address. The more specific allegation has been made that White was motivated to vote in his former precinct, where he was no longer living, by a desire to conceal his move out of Fishers Town Council District 2 in order to keep the public

²⁰ See footnote 4. Subpoena authority for the investigation of violations of the Election Code, in particular vote fraud, has been reputedly requested by the Secretary of State...and always denied – normally by action of the Democratic House majority.

office for which he was no longer qualified. While it may be possible to draw inferences from the documents and what is known about White's activities during the first half of 2010, it would seem that additional evidence would be needed to be gathered in order to establish beyond a reasonable doubt, what White's knowledge and intentions were.

The manner in which White appears to have availed himself of the "special procedures for voting in the precinct of former residence"²¹ when he voted in the November, 2009 Special Election suggests that he had knowledge of the voting residency requirements and proper use of exceptions. Also, every polling location in Indiana is required by law to display a large "Voter's Bill of Rights" poster in a prominent location, which details residency requirements and procedures. Finally, White's occupation as an attorney, his elected position as a town council member and his position as a county political party leader, suggest that his knowledge of Indiana's residency and voter registration laws might reasonably be implied.

d) The Exceptions

IC 3-10-12, Indiana's effort at compliance with the NVRA, preserves the right of a person moving from one precinct to another in a county to vote, subject to the voter making an oral or written affirmation about their change in residence.²² Except for, and subject to the provisions of IC 3-10 Chapters 10, 11 and 12, a person voting in a precinct in which they no longer reside commits vote fraud. In certain, well defined circumstances, IC 3-10 authorizes a person to vote in a precinct in which they no longer reside. The availability of the exceptions, allowing voting in a former precinct, and the steps Indiana requires of voters wishing to avail themselves of the exceptions are spelled out in the Indiana Voter's Bill of Rights poster which is required by law to be prominently displayed at every polling location during every election. Poll workers

²¹ IC 3-10-11; IC 3-10-12.

²² IC 3-10-12, an exception to IC 3-14-2-11 in this case, begins with a section specifically stating that the **purpose** of the chapter is to bring Indiana into compliance with the NVRA. The purpose of the NVRA was to prevent states from disenfranchising voters with overly stringent, inflexible residency requirements. The NVRA and Indiana law limit the ability of partisan challengers or poll workers to disenfranchise voters who might merely change their residence from one precinct in a county to another precinct in the same county.

receive mandatory training in the availability and procedures required for use of the exceptions and the procedures are explained in detail in the Indiana Election Day Handbook, which is the official guide and a fixture at every poll on election day.²³

In pertinent part, IC 3-10-12-3.4 provides that a voter, registered in a precinct, who no longer resides in the precinct, but on election day, still resides within the same county and same congressional district, may:

- (1) correct the voter registration record; and
- (2) vote in the precinct where the voter formerly resided;

if the voter makes an oral affirmation ...or a written affirmation... as described in section 4 of this chapter of the voter's current residence address...

(e) A voter entitled to make a written affirmation under subsection (b) may make an oral affirmation. The voter must make the oral affirmation before the poll clerks of the precinct.

After the voter makes an oral affirmation under this subsection, the poll clerks shall:

- (1) reduce the substance of the affirmation to writing at an appropriate location on the poll list; and
- (2) initial the affirmation.

Unlike IC 3-10-10 and 11, IC 3-10-12 provides no time limits as to when a voter who has moved from the precinct they formerly lived may return to vote. Subject to the requirements that they still reside in the same county and congressional district, initiate the required correction of the voter record and make the oral or written affirmation, the person can return to the previous precinct whether they moved away one day before an election, or years before an election. Since the voter is required to initiate the correction of the voter registration record and make an affirmation – that either the voter or a poll clerk puts in writing, it is said that this “fail-safe” voting exception can only be used one time.²⁴

²³ See Appendix 3U.

²⁴ A voter may return one-time *per precinct* that they remain registered in and were a resident of. Thus, a voter may lawfully take advantage of the exception on multiple occasions – at different residences should they move from place to place. Since a voter is required to correct and update the voting record when they

White's entry in the poll book for the 2009 Special Election, shows that he indicated that his residence had changed – and thus he was voting in his “former” precinct pursuant to either IC 3-10-11 “Special Procedures for Certain Indiana Voters to Vote in the Precinct of Former Residence *or* IC 3-10-12 “Special Procedures for Certain Indiana Voters to Vote in the Precinct of Former Residence under NVRA.” Though SVRS records show that the Hamilton County Voter Registration office proceeded to update White's voter registration based on his writing a new address into the poll book, SVRS Records do not contain copies of the specified affidavit or poll worker acknowledgement (initials).

Assuming that White's May, 2010 voting records are correct and complete and assuming that the poll workers staffing Delaware 12 precinct that day²⁵ followed Indiana law and provisions of the 2010 Election Day Handbook, the records offer no indication that White, if he indeed had moved out of the precinct to 13086 Overview Drive, initiated a correction of his voter registration or offered either an oral or written affirmation. Had he done so, pursuant to law, there would be some evidence of it on the official poll book record which is a public document and maintained in the SVRS.

Much has been made that any failure of White to properly execute an affirmation affidavit required by the fail-safe exception, was simply a mistake of a technical or inconsequential nature. The Agency would emphasize that it is important for Indiana's election administration community, political parties, candidates and voters to understand that the requirement of making an oath, affirmation or affidavit, which is called for a multitude of times in the Indiana Election Code, is a bedrock principle, foundational to our trusted system of election law. Far from being technical or inconsequential in nature, the sanctity and enforceability of oaths is arguably our Election Code's most important element. The requirement of affirmations made under oath is employed throughout the Indiana Election Code to ensure integrity, accountability and confidence in our elections.

take advantage of the exception, were they to return to their “former” precinct a second time, they would find that they are no longer registered within that precinct.

²⁵ See Appendix 1K for the names and positions of the Delaware 12 precinct poll workers on May 4th 2010.

5. The Case for Voter Registration Fraud

Indiana Code 3-14-3-1.1 provides:

“False, fictitious, or fraudulent registration applications or ballots”

A person who knowingly does any of the following commits a Class D felony:

(1) Procures or submits voter registration applications known by the person to be materially false, fictitious or fraudulent.

If subsequent investigation of the voter registration address change (from the Pintail apartment address to his former wife’s residence) that White initiated in November, 2009 should reveal that Broad Leaf Lane was not, either in fact, or by operation of law, going to be his residence, and that White had knowledge of this, then White could be charged with the submission of a false voter registration application. This charge does not require voting, just the knowing submission of false, fictitious or fraudulent information on a voter registration application. If the facts were available to support this charge, it could be brought in conjunction with a “voting in the wrong precinct” charge or separately.

a) Submission

When White voted in the 2009 November Special Election in the precinct where his apartment was located, examination of his poll book listing indicates he indicated that his address had changed, from the apartment address to the Broad Leaf Lane address. This is indicated by a check mark next to a box marked “Name/Address Change.” The street address “7527 Broad Leaf Lane, Fishers, IN 46038” is written in below the checked box. It can be inferred that White checked the change of address box and supplied the new address in that, pursuant to the 2008 Election Day Handbook, if a poll worker had written this information into the poll book, the poll worker’s initials should appear on or in the vicinity of White’s poll book listing.^{26,27} Election Day Handbook procedures direct that

²⁶ The Secretary of State publishes and distributes an updated and current official election day handbook every two years. Thus, the “2008 Indiana Election Day Handbook” provided the operative rules and

if an election board member (i.e.: poll worker) on behalf of a voter, writes in a change of address in the poll book, that they include their initials along with the change of address information. An examination of White's SVRS voting record for the November 2009 Special Election, and a check with the Hamilton County Voter Registration officer, offer no evidence that White, on his own initiative or at the prompting of poll workers, executed an "*Affidavit of Request for Transfer of Voter Registration*" when he voted.²⁸ Instructions provided in the 2008 Election Day Handbook provide that a voter who has moved outside of the precinct, but still within the same county and congressional district (as was the case with White) is to either make a written affirmation, on a form VRG-4/12 or make an oral affirmation, after which a poll worker **must** both complete a VRG-4/12 form for the voter and place their initials on it.

It has been alleged that White exhibited his knowledge of the "former precinct voting fail-safe procedures" by utilizing the procedure in the 2009 Special Election. However, an examination of White's SVRS voting record from the 2009 Special Election and records retained by the county Election Board do not exhibit that the election board staff followed procedures required under the statute or 2008 Indiana Election Day Handbook, by either preparing a VRG-4/12 or initialing a change of address in the poll book.²⁹ It is unknown from the documentary evidence if White made an oral affirmation of his change of address. It appears that he checked the change of address box and wrote in his new address. The documentary evidence also does not indicate if White moved more than 30 days before the Special Election³⁰, within the 30 days immediately preceding the election, or if he was attempting to indicate his intention to move sometime before the next

procedures for poll workers for elections held in 2009. According to Indiana Election Division staff, the relevant chapters (3, 4 & 5) in the 2008 and 2010 handbooks are unchanged and identical.

²⁷ The names and contact for the poll workers who staffed the precinct where White allegedly illegally voted on May 2nd 2010 has been obtained by the Agency (see Attachment I-K). The Agency has not attempted to contact or interview these individuals.

²⁸ Form VRG-4/12. See 2008 Indiana Election Day Handbook p. 18-19.

²⁹ See IC 3-10-12-1 (e): "After the voter makes an oral affirmation under this subsection, the poll clerks shall: (1) reduce the substance of the affirmation to writing at an appropriate location on the poll list; and (2) initial the affirmation.

³⁰ The period for open voter registration for an election closes 30 days prior to each election. If a voter no longer resides within the precinct he is registered in on the day of an election, he can only vote in the (former) precinct subject to one of the exceptions provided in IC 3-10-10, IC 3-10-11 or IC 3-10-12.

election and thus wanted to initiate a change his voter registration address to ensure his eligibility for that election.

It is not evident from White's 2009 Special Election voting records that he or the poll workers were aware of, or were attempting to follow the "Special Procedures for Certain Indiana Voters to Vote in the Precinct of Former Residence under the NVRA", known also as the "fail-safe" voting procedure.³¹ Thus, it would seem that the investigation would need to advance further before the assumption or inference can be made that White was aware of the existence and details of the "fail-safe" voting procedures available to him in both the 2009 Special Election and the May, 2010 Primary Election.

White's 2009 Special Election SVRS records indicate that approximately two-and-a-half weeks after the 2009 Special Election, the Hamilton County Election Board sent a letter to him, presumably to the new address he indicated on the poll book (the Broad Leaf Lane residence) to verify his change of address.³² Hamilton County Voter Registration staff have indicated that a letter of this type would include a completed voter registration application card, which the voter is instructed to sign and return to the county Voter Registration Office. Neither Hamilton County or SVRS records indicate that the letter was returned to the voter registration office as undeliverable. Had this been the case, the voter's record would be marked to reflect the non-delivery and the voter's record would not be updated. SVRS records do show however, that on February 22nd 2010, a few days before White executed the purchase paperwork on the Overview Drive condominium, the Hamilton County Voter Registration office received and filed a signed voter registration application from White. The application card indicates that it was submitted for the purpose of making an address change; from the Pintail apartment to 7527 Broad Leaf Lane. The SVRS record does not indicate if this voter registration application is the same one that the county voter registration office prepared and sent to White in November, 2009, or if it is a new voter registration application form. The voter registration form, in

³¹ IC 3-10-12.

³² Pursuant to IC 3-7-13-10 the "registration period begins December 1 of each year...and continues through the twenty-ninth day before the date a primary election is scheduled....the registration period ceases (in a) precinct on the twenty -ninth day before a special election..." See also IC 3-7-16-24 "Updating a voter registration record" and IC 3-7-18-9 (2) "a registration (or update) received outside of the registration period will allow the individual to vote in the next election..."

addition to serving as an affidavit of a person's age, citizenship and residency, is also designed to allow its use for updating a voter's name or address. When used to update voter registration information, the form does not require the voter to supply date(s) that the voter's address or name changed nor does the form provide spaces for this information. The registration card is in the form of a sworn oath however, so the applicant is legally bound to the truth of the information provided therein.³³

For the purpose of proceeding to investigate whether or not White submitted a fraudulent voter registration application, or knowingly false information, in November, 2009 or February, 2010, a legal and factual determination as to his legal domicile for voting will need to be made.

b) Knowledge

The knowledge element must be proven for every required element of an offense.³⁴ Thus a prosecuting authority must establish that White; a) knew that he was submitting a voter registration application and; b) knew that the information it contained was materially false or fraudulent. Intent and knowledge may be inferred however "from the voluntary commission of the prohibited act as well as from the surrounding circumstances." *Carty v. State*, 421 N.E.2d 1151, 1981 App. LEXIS 1475 (1981)(emphasis added); *Austin v. State*, 425 N.D.2d 736, 1981, Ind. App. LEXIS 1647 (1981). It is evident from the documents examined that White submitted a signed and dated, change of address voter registration application to the Hamilton County Voter Registration office on February 22nd 2010. It is not clear from available documents whether White's indication of a "new address" on the 2009 Special Election poll book, which the Election Code describes as a "registration update" is the legal equivalent to the knowingly submission of a voter registration application, which is explicitly in the form of an affidavit. Additional investigation as well as judicial fact finding would likely be necessary to clarify this

³³ It is not clear from either the Indiana Election Code or review of case law if a notation of an address change made on a poll book by a voter (or failure to make a notation of address change) is of the same legal consequence of making a false statement on a signed voter registration card, which is in the form of an affidavit., though making a change of address notation on a poll book generally serves the function of initiating the updating of a person's voter registration – which can be done via a voter registration card as well.

³⁴ See: IC 35-41-2-2 (d).

point. For reasons discussed in the following section, it is not clear at this stage in the investigation, if the residence information White wrote into the poll book when he voted in the November 2009 Special Election was true or false, or if White even knew, where his legal domicile for voting purposes was at the time.

c) Materially False or Fraudulent

The available documents do not establish that White's change of voter registration from the Pintail apartment to the Broad Leaf Lane residence was totally without factual basis. The record does show that White was experiencing various changes in his personal and professional life that involved his moving from place to place within Fishers. In two relatively recent vote fraud cases, involving numerous voters and votes, Indiana courts made specific findings of fact that individuals who were charged with fraudulently registering to vote and fraudulently voting in precincts in which they did not reside, had no connection with the claimed residences or plausible explanation for the registration and voting – except their participation in a coordinated effort to manipulate the results of elections. In the 2003 East Chicago Mayor Primary, hundreds of persons, who did live outside the boundaries of the city, were induced to submit voter registration and absentee ballot applications with addresses that included vacant lots, abandoned homes, commercial buildings and residences of people they did not know and had never met.³⁵ Also, after a very close, contentious recount in the 2007 Muncie Mayor election, an investigation revealed that absentee ballot applications with addresses of vacant properties in the names of people who could not be located, had been submitted and votes returned.³⁶ In the East Chicago and Muncie mayoral race cases, post election challenges led investigators to look through large numbers of voting records to identify votes cast in the names of people who simply did not live in the districts.

³⁵ Trial court findings of fact described in *George Pabey v. Robert A. Pastric, and the Lake County Board of Elections and Registration*, 816 N.E.2d. 1138; 2004 Ind. LEXIS 705. After the Indiana Supreme Court overturned the results of the election the Lake County Joint Vote Fraud Task Force filed felony vote fraud charges against 52 individuals. The charges resulted in 45 convictions for misdemeanor vote fraud.

³⁶ See: http://orig.thestarpres.com/blogs/govblog/2007/11/more_politics_more_vote_counti.html; After being convicted on three counts of felony voter fraud, the special judge hearing the case reduced Monet Murphy's convictions to Class A misdemeanors.

In White's case, the documents indicate that, though his actions and intentions as of certain dates are the subject to question and speculation, he certainly had some level of connection with the Pintail apartment, the Broad Leaf Lane residence and the Overview condominium and there has not been any allegation that he was engaged in an effort to illegally influence any election outcomes. Thus a prosecuting authority will likely need to carefully flesh out the details of the timing of White's moves, the apparent permanency of the moves and what his intentions were. For example White lived at the Broad Leaf Lane residence for several years before he moved to a presumably smaller apartment in the midst of a separation and divorce. Though at some point he updated his voter registration from Broad Leaf Lane to the Pintail apartment, it is a legal presumption that a previous domicile is not lost until a new one is established and the legal definition of domicile included the intention to permanently stay or always return to... It is not clear that White's intention to permanently reside, and always return to the Pintail apartment is a reasonable or provable assumption. There is also a legal presumption that the Broad Leaf residence, the home of White's child, and next of kin, remained his legal domicile notwithstanding his move to the Pintail apartment and then on to the Overview condominium. Thus, it seems clear that additional investigation and judicial determinations would be required to establish White met the knowledge and intent elements of voter registration fraud.

6. Lesser Offenses

a) Lesser Included Offenses Generally

An "included offense" is defined as an offense that:

- (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;
- (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
- (3) differs from the offense charged only in the respect that a less serious harm or risk to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.³⁷

³⁷ IC 35-41-1-16

The Chapter in the Indiana Election Code dealing with vote fraud (IC 3-14-2) does not directly specify particular criminal penalties for the **attempt** to commit vote fraud, via the various activities or lesser degrees of culpability (i.e. acting **recklessly** rather than knowingly).³⁸ However, the Indiana Criminal Code indicates that lesser included offenses can be established on a case by case base.³⁹ *Roddy v. State*, 182 Ind. App. 156, 394 N.E.2d 1098; *McGill v. State*, 465 N.E.2d 231, 1984 Ind. App. LEXIS 2786 (1984); *Meriweather v. State*, 659 N.E.2d 133, 1995 Ind. App. LEXIS 1572 (1995).

It would seem that IC 3-14-2-11 “Voting in other precinct” which is classified as Class D felony vote fraud, would be susceptible to offering of jury instructions covering the included offenses of “attempted” or “reckless” voting in a precinct other than the one in which a person was registered or residing. If subsequent investigation and judicial fact-finding do not clearly establish that White possessed the requisite knowledge and intention, a jury might still determine that: an ineffectual effort to take advantage of the “fail-safe” voting procedure constituted an attempt to commit vote fraud; the voter knew only generally of the applicable laws; and recklessly proceeded to vote disregarding specifics and consequences, or that the social harm was slight, given that the ballots in the precinct White voted in was nearly identical to the ballot the alternate precinct, or given that there is no evidence of an intention to influence an election outcome.⁴⁰

It has been alleged that the specific, operative offense White committed was in failing to update his address for his voter registration records on a timely basis. More particularly, his failing to inform or providing a written or oral affirmation of a new address at the time he cast his vote in the May 2010 Primary Election. The Indiana Election Code imposes a duty on voters to update their voter registration records; however the statute

³⁸ The Election Code does not prescribe “attempted” vote fraud offences, the Criminal Code provides however that an attempted crime, whether successful or not, carries the same penalty as actual commission of the attempted crime. Conviction of an attempted crime does not carry a lesser penalty than that which is provide for the same crime accomplished (IC 35-41-5-1).

³⁹ *Id.*

⁴⁰ In *Evrard* (1975), *infra*, the Indiana Supreme Court held that all of the “odds and ends” constituting a candidates residence need not match up perfectly, stating: “(N)o such absolute assurance of a voter’s township and precinct residence is required to protect the integrity of the election process.”

provides neither a time parameter nor penalty for non compliance.⁴¹ In contrast, the duty of an Indiana driver to update their driver's license if they change their address or name is specific with respect to time and penalty. IC 9-24-13-4 provides that a driver's license must be updated within 30 days of a change in name or address and IC 9-24-13-5 provides that the failure to update a driver's license on a timely basis is punishable as a Class C Misdemeanor. The placement, of the statute requiring a voter to update their address (Title 3, Article 7 Voter Registration) arguably suggests that the consequence of a voter's failure to update their voter registration record, at least within 29 days of an election, is the loss of eligibility to vote and eventual removal from the voter rolls, rather than a criminal sanction.

b) Withholding Information from a Poll Taker

IC 3-14-2-7 provides that:

A person who knowingly:

(1) upon demand of a poll taker, withholds any information from the poll taker with regard to the qualifications of a voter or person not entitled to vote;

(2) furnishes to a poll taker any false information with regard to the qualifications of any person for voting;

commits a Class A misdemeanor.⁴²

If the essence of the vote fraud claim is that White provided information that he knew was untrue when he checked the "address unchanged" box on the poll book and possibly stated to poll workers that his address had not changed, then IC 3-14-2-6 would seem to aptly fit the description of his act. Knowingly giving a poll worker incorrect information appears to be a lesser included offense of the crime of "voting in other precincts" (IC 3-14-2-11) and is classified as a misdemeanor. Notwithstanding the IC 3-10-12/NVRA exceptions which allow a voter who is no longer residing in the precinct in which they are registered to vote to vote in their former precinct, the only qualification for voting

⁴¹ IC 3-7-39-1: "A voter who changes residence shall transfer the voter's registration to the address where the voter currently resides by sending a transfer of registration on a prescribed form to the circuit court clerk or board of registration."

⁴² See footnote 4 questioning whether "poll taker" is synonymous with "poll clerk".

questioned in White's case is that of his residency. Thus, if a prosecutorial authority can establish that White knowingly provided incorrect information about his residency status, or knowingly failed to provide updated information, it would appear that a violation of IC 3-14-2-7 (a Class A misdemeanor) could stand.

7. Conclusion

Based solely on White's voting records, other public documents, and an analysis of statutory and case law, the Agency observes apparent, albeit rebuttable, intent that White knowingly voted in a precinct in which he did not reside in the 2010 Primary Election and/or provided incorrect information to a poll taker. There are also some apparent, albeit rebuttable, indications that White's change of his voter registration address from the Pintail apartment to the Broad Leaf Lane residence in late 2009 was false, fictitious or fraudulent – a presumptive violation of IC 3-14-3-1.1. The infraction “knowingly providing false information to a poll taker” (IC 3-14-2-7) appears to be available as a lesser included offense and it appears that a case for either unintended vote fraud or reckless voting in the wrong precinct could be made on essentially the same facts.

Though there is evidence in the record that as of May 4th 2010, White was no longer living in Delaware Township precinct 12, critical details as to specifically where White's legal residence or domicile was at particular times, when White's legal residency changed from one place to another, and what his intentions were and knowledge was, is lacking and need to be established. White's use of different, seemingly contradictory, addresses on official, public documents has been inferred by some as an attempt to conceal that he was no longer living in the town council district he was elected to represent or in the precinct that he had affirmed his registration in on February 22nd 2010. Others have characterized White's discoordinate address information as an innocent byproduct of a unique period of time in White's life when his career and domestic living arrangements were changing. The taking of sworn statements, depositions or oral testimony of persons familiar with White's daily activities and whereabouts from

November, 2009 through the 2010 May Primary Election would facilitate this aspect of the fact-finding process.

If, as has been claimed, White intended to avail himself of the “fail-safe” non-resident voting option, which explicitly authorizes conduct that would otherwise be a violation of IC 3-14-2-11, voting records from the May Primary should include a written affidavit or initialed notations on White’s poll book entry, evidencing his intentions. However, SVRS records from the election, which are presumptively accurate, do not evidence that White marked the check box provided in his poll book entry to indicate that his address had changed. If White orally affirmed to a poll worker that his address had changed, pursuant to the Election Code and 2010 Election Day Handbook, the poll worker so informed should have prepared a written affidavit and made an initialed, notation in the poll book which would serve to validate his qualification for the option and initiate a change in his voter registration for upcoming elections.

Though rebuttable, the allegations and press reports that White violated IC 3-14-2-11 when he voted in Delaware Township precinct 12 in the May 2010 Primary Election, though he no longer lived there, is sufficient to warrant public concern over compliance with laws intended to check vote fraud and assure accurate, orderly, and trustworthy elections in Indiana as well as uniform compliance with election laws. The available evidence however, is not comprehensive and the applicable laws require findings of fact which will likely require additional investigation including sworn testimony from witnesses which the Agency is not authorized to subpoena.

The allegations, arising in the midst of a contentious state-wide election, are tinged with political subtext. White, who seems to have had little opportunity to respond to the allegations and examination of his records, is entitled to the presumption that he voted lawfully, to cross examination of evidence and witnesses and to provide evidence supporting the lawfulness of his actions.

As a result of the examination, the agency believes the interests of the public and our election’s process would be served by further, investigation and objective fact finding in the matter.